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Reviewing Behind the Success and Failure of U.S. Export Intermediaries -- Transactions, Agents and Resources

Finn Martensen

Behind the Success and Failure of U.S. Export Intermediaries—Transactions, Agents and Resources

BY MIKE W. PENG, Greenwood Publishing Group, 1998

Reviewed by Finn Martensen*

Mr. Peng's book contains two empiric studies of the performance of United States intermediaries. Except for one prior study from 1994, this is the first study of its kind. The first study, carried out in 1994, found that the performance of the U.S. export intermediaries fell below the expectations of the manufacturers more than half of the time. However, as stressed by Mr. Peng on page five of the book, the survey carried out in 1994 was on manufacturers instead of the intermediaries. This fact leads Mr. Peng to the opinion that no conclusion should be drawn from the 1994 study.

Mr. Peng's book contains a broad definition of the term "a U.S. export intermediary." The definition encompasses two types of businesses, namely the export management company and the export trading company. Traditionally, an export management company is a company that helps exporters to manage their export. This means that the export management company simply functions as the management department of a larger export company. The export trading company, on the other hand, assists actively in finding customers abroad to which the American producer can sell its products.

The definition of U.S. export intermediaries is found in Chapter Two of Mr. Peng's book. This chapter also contains an overview of strategic choices in export channel selection. The description of these choices gives rise to the following comments.

In describing the strategic choices in export channel selection, three choices are mentioned. *The first choice* is named foreign direct investment. According to the author's definition this means export to the foreign customer via a foreign subsidiary of the United States producer/manufacturer. *The second choice*, named direct export, is defined as the American producer's/manufacturer's direct sale to the foreign customer. *The third choice*, named indirect export, is defined as the American producer's/manufacturer's export to the foreign customer via U.S. export intermediary.

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In commenting on the three choices, Mr. Peng notes that the first choice, foreign direct investment, is ". . . an enormous, complex, and costly undertaking which many firms, especially small and mid-size ones, have neither the capital nor the expertise to handle. . . ." In regards to the second choice, direct export, Mr. Peng notes, among other things, that this choice ". . . while less demanding, also requires substantial commitment from the producer's resources: Progressing from dedicated sales people handling export orders, coming to setting up an export department, to establishing an export/international division. . . . " In regards to the third choice, indirect export via an export intermediary, Mr. Peng notes, among other things, that ". . . the use of export intermediaries also entails costs and benefits for the producer. By using intermediaries as agents, producers have to incur *agency costs* when dealing with them in their principal-agent (manufacturer/intermediary) relationship. . . ."

It should be noted that the U.S. producer/manufacturer who considers initiating exports to foreign customers have a number of other choices in addition to the three mentioned in Mr. Peng's book. The first alternative pertains to foreign direct investment. In addition to initiating export via a foreign subsidiary, this can alternatively be done by setting up a branch of the U.S. corporation abroad. Setting up such a branch does not require establishment of a separate foreign legal entity. Provided the tax treaty between the United States and the country in question favors taxation of a foreign branch, this is often a viable alternative to setting up a foreign subsidiary.

Instead of using U.S. intermediary (an export intermediary), export is often carried out via the use of foreign intermediaries. These options are not dealt with in Mr. Peng's book. In choosing a foreign intermediary, the U.S. exporter has two choices:

First, export can take place via a foreign commercial agent. The role of such an agent is to solicit orders on behalf of the American producer/manufacturer in the foreign country in question. Once the commercial agent has solicited an order from a foreign customer, this order is sent to the American producer/manufacturer for acceptance. The acceptance constitutes an agreement directly between the American producer/manufacturer and the foreign customer. The use of foreign commercial agents is extremely common. Foreign commercial agents are primarily used by small and mid-size American producers/manufacturers. Such use is a cost efficient and simple way to initiate export to a foreign country. Like the export intermediary, the commercial agent is paid via a commission of the sales solicited by that agent.

Second, the American producer/manufacturer can conduct export to foreign customers via a foreign distributor. The key difference between a commercial agent and a distributor is that the distributor trades in its own name by purchasing the goods from the American producer/manufacturer and reselling the goods to the foreign customer. This means that no contractual relationship is established between the American producer/manufacturer and the foreign customer. The foreign distributor makes its profit via the markup on the goods purchased from the

American producer/manufacturer and resold to the foreign customer. Like the foreign commercial agent, the use of foreign distributors is very common, and it is a cost efficient and simple way to conduct export to a foreign market.

The use of commercial agents or distributors are certainly viable alternatives to the use of U.S. export intermediaries. One obvious advantage in using a foreign commercial agent or distributor is that these entities are likely to have an in-depth knowledge of the market in which they operate. A disadvantage may be that it is sometimes more difficult for the American producer/manufacturer to control and follow-up on the performance of such foreign representatives.

In addition to the use of a foreign intermediary, it is worthwhile noting that a growing number of sales are conducted via the Internet, generally named "e-commerce." This way of selling commodities to a foreign customer is a price efficient tool for the small or medium sized American producer/manufacturer, who wants to explore a foreign market without involving any party other than the end customer, and without undertaking the establishment of a foreign presence in the form of a subsidiary or a branch office.

It would have added to the value of Mr. Peng's book had the description of the supplementary entities dealt with above been integrated in the description of the strategic choices in export channel selection.

The studies performed on export intermediary performance are two fold:

The first study, described in Chapter Six of Mr. Peng's book, is founded in six case studies. This study shows that the six U.S. export intermediaries handle the American producers/manufacturers export in radically different ways. For example, there is no uniformity as to where the negotiations with the foreign customers take place. They take place always abroad, half-abroad, half in the U.S. or mostly in the U.S. Also, in regards to title to the goods, it is interesting to note that three of the intermediaries interviewed take title to the goods (like a foreign distributor would), one of them never takes title to the goods, and two of them sometimes takes title to the goods. Based on the results of these studies, it seems fair to conclude that the role of the U.S. export intermediary is either the role of a foreign commercial agency or the role of a foreign distributor with the difference that the U.S. export intermediary is located in the United States and not abroad.

The second study, described in Chapter Seven of Mr. Peng's book, is a study based on mail surveys. Surveys were received by 915 U.S. export intermediaries and 195 surveys were returned from thirty-eight states and the District of Columbia. Most of the questions asked pertained to the nature of the U.S. export intermediaries with the results presented in a number of tables contained in Chapter Seven. Table 7.9 on page 121 shows interestingly enough that approximately fifty percent of the U.S. manufacturers/exporters that use U.S. export intermediaries are either not interested in exporting or are occasional exporters. This finding seems to indicate that U.S. businesses who are established exporters or very determined to initiate and maintain export to foreign markets, prefer choices other than the use of U.S. export

intermediaries. It should be noted, though, that this observation is not directly supported by Mr. Peng's study.

For the most part, Mr. Peng's book offers a unique study of the nature and the role of U.S. export intermediaries. Since such intermediaries are most likely to be used by small and medium sized American producers/manufacturers, and since more of these small and medium sized businesses are interested in export, the study is indeed very relevant as a tool for determining whether a U.S. export intermediary should be chosen as one of the channels to export. As mentioned, it would have added to the value of the book had more emphasis been put in describing all relevant alternatives to the use of a U.S. export intermediary.

International Banking—Cases, Materials and Problems

BY MICHAEL P. MALLOY,* Carolina Academic Press, 1998

Reviewed By Patricia A. McCoy**

As BCCI,[1] Daiwa Bank and the Asian flu have painfully reminded us, federal banking regulation in the United States cannot afford to turn a blind eye to the onslaught of globalization. In his timely new casebook, *International Banking*, Michael Malloy canvasses the implications of increased globalization of financial services for international banking activities and banking supervision at large.

As a specialty niche in the American law school curriculum, a course on international banking law has no particular canon (apart from the U.S. regulatory regime) and could pursue a number of approaches. One might emphasize, for example, the economic basis of cross-border banking supervision, the desirability and feasibility of international convergence of regulatory standards, the relationship between banking regulation and global financial services generally, the socio-political implications of international banking law, the historical development of global regulation of financial services, or the role of multilateral financial institution organizations. Professor Malloy has elected to emphasize the foreign policy implications of transnational banking regulation. By veering away from the highly theoretical and by relying on primary texts, he has designed a book that provides firm and flexible grounding for whatever theoretical approach an instructor wishes to take.

Professor Malloy uses as his point of departure the oversight of international banking activities by federal banking regulators in the United States. Federal regulators have two main areas of purview in this regard: regulating the international activities of domestic institutions whose deposits are federally insured and overseeing the domestic activities of foreign banks that operate in the United States. Far from placing exclusive emphasis on supervision in the United States, however, the casebook provides admirable and extensive coverage of international banking law developments across the Atlantic, including the pronouncements of the Basle Committee on Banking Regulation, the banking ramifications of the Uruguay Round of GATT multilateral trade negotiations and the much awaited banking directives of the European Union.

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1. In the most notorious international banking scandal of the early 1990s, regulators from across the world shut down the operations of the Bank of Credit and Commerce International (popularly known as BCCI) in forty-four countries in 1991 amidst allegations that BCCI had manipulated its books and concealed huge derivatives losses. While allegations of money laundering and drug trafficking dogged BCCI, the real concern of American regulators was with BCCI's attempts to enter the U.S. banking market secretly through illegal fronts. *See generally* RAJ K. BHALA, FOREIGN BANK REGULATION AFTER BCCI (Carolina Academic Press, 1994).

Following a preliminary overview of current major issues in international banking supervision, Professor Malloy begins with the nuts-and-bolts of federal regulation of international banking. The idiosyncratic American system of dual banking, with the opportunities it affords for state protectionism, has the potential to inject profound complications into the foreign policy of the United States toward foreign banks. In recent clashes between federal regulators and the states over the "national treatment" of foreign banks mandated by the International Banking Act of 1978,[2] state courts have unexpectedly and rather remarkably cast aside parochial concerns in deference to federal primacy in foreign relations. This debate over whether to allow foreign bank entry at all, and if so, whether such entry should be based on condition of reciprocity, is one that all banking systems face in one form or another.

Just as banking has been one of the last preserves of internal trade barriers within the United States, that protectionism has been mirrored internationally. While entry barriers continue to fall domestically and internationally in banking, foreign bank entry around the world remains subject to higher barriers on the whole than trade in goods. Thus, any discussion of this subject must grapple with the effects of the General Agreement on Trade in Services (GATS), which emerged from the Uruguay Round of GATT multilateral trade negotiations in 1994. The GATS aspired to extend GATT's principles of nondiscrimination to trade in services generally and specifically to financial services. As Professor Malloy narrates, however, the United States dealt a blow to this aspiration when it decided in 1995 to withdraw from the GATS multilateral process for financial services and instead resorted to bilateral negotiations on reciprocal entry privileges for banks.

Professor Malloy also approaches the topic of cross-border entry by paying attention to decisions regarding the form of corporate entity (especially whether to enter through a branch or through a subsidiary) and the legal consequences that attach thereto. Decisions as to entity form are explored both through the relevant federal regulations and through decisions of claims by foreign depositors against U.S. banks for refunds of their deposits following expropriation of the foreign branches where their accounts were maintained.

Any treatment of cross-border entry must also focus on the types of trade barriers that banks seeking to expand internationally may confront. The casebook does an admirable job of surveying different types and degrees of barriers to entry by foreign banks in various countries, including the United States. Many readers will find the materials on the ramifications of the European Union's Second Banking Directive for expansion into Europe by American banks of particular interest.

The growth in cross-border banking has given rise to a concomitant need for transnational prudential supervision. The failure of Herstatt Bank in West Germany

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2. Pub. L. No. 95-369, 92 Stat. 607 (1978) (codified at 12 U.S.C. §§ 3101- 3111 (1998)).

in 1974 and, more recently, the BCCI scandal,[3] cast a spotlight on the difficulties of such supervision. The pronouncements of the Basle Committee on Banking Supervision,[4] which operates under the auspices of the Bank for International Settlements (BIS), have been especially influential in this regard. With time and experience, the Basle Committee has refined its approach to cooperation between supervisory authorities in host and parent countries. Using essential primary documents ranging from the Basle Concordat of 1983 to the Core Principles for Effective Banking Supervision of 1997, Professor Malloy traces how the Basle Committee's approach to supervision and capital standards evolved in reaction to a string of highly publicized international bank failures, including Banco Ambrosiano and BCCI. He then compares the European Union's approach to supervision and minimum capital requirements in anticipation of free cross-border branching within the European Union's geographic boundaries by banks in its member states.

A current topic of supervisory concern is the reprise of the less-developed-country (LDC) debt crisis of the late 1970s and early 1980s, which has resulted in losses to major money center banks from loans to emerging markets such as Russia and Latin America. International lending presents added risks, including the risks of socio-political upheaval and radically different legal regimes. The text introduces students to the risk elements in lending abroad, followed by directives of federal banking regulators on risk management and reserves for loan losses. The lawyer's role in facilitating risk management is flushed out through a detailed examination of decisions in U.S. courts on the enforceability of international loan agreements following a host country's decision to repudiate private, commercial obligations. Focusing on the text of disputed loan agreements in individual cases, Professor Malloy explores how agreements can be drafted to minimize country-specific risks. In a related vein, the book also surveys the enforcement, regulation and risks of credit equivalents and payment instruments such as letters of credit and bankers' acceptances.

In the wake of the LDC debt crisis, the credo of free capital flows has come under increasing attack for its effects in destabilizing emerging economies. To the astonishment of many observers (including the IMF), this problem has mutated into a worldwide contagion, ruining the economies of Southeast Asia, Russia and Brazil in one brief year. As the destabilizing effects of sudden capital outflows are being debated, currency controls, an idea that was only recently greeted with universal derision in the Western financial establishment, are now undergoing reappraisal both as a means of controlling volatility and of stemming illegal expropriation of assets by current or former elites.

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3. *See generally* BHALA, *supra* note 1 and accompanying text.
4. Formerly known as the Committee on Banking Regulation and Supervisory Practices.

Professor Malloy examines the renewed debate over the desirability of currency controls in the context of the law's treatment of LDC debts and the obligations of U.S. banks to pay foreign deposits. Such disputes typically arise when central banks of cash-poor countries with dwindling foreign reserves impose exchange controls barring international payments in foreign currencies, whether to repay loans denominated in foreign currencies, to repay deposits, or to honor local drafts. Shying away from an economic paradigm, American courts have instead treated the problem of currency controls as a clash between the freedom to contract and the sovereignty of foreign states. The casebook examines in thorough detail how U.S. courts have resolved this clash through resort to standard principles of contract law, the Foreign Sovereign Immunities Act, the act of state doctrine, the Articles of Agreement of the IMF, and even the hoary *in rem* doctrine in *Harris v. Balk*.[5] The book also canvasses new approaches to maximizing recovery on bad LDC loans.

Bank secrecy laws have likewise erupted into controversy, standing accused of facilitating crimes ranging from drug trafficking and the illegal expatriation of assets by corrupt regimes to economic plunder of the victims of the Holocaust. Nations such as Switzerland and the Cayman Islands have attracted deposits from around the world (and built formidable banking industries in the process) by offering guarantees of financial privacy that are considered to be virtually ironclad. In such countries, bank secrecy must be maintained, with few exceptions, under pain of criminal punishment.

The legal culture in the United States is notably different. It is fair to say that in the United States, the war on drugs and the prerogatives of commerce have taken precedence over privacy of individual citizens when it comes to the disclosure of banking data. While bank disclosures to government officials are regulated by the Right to Financial Privacy Act of 1978,[6] citizens have little legal protection against disclosures to private businesses. Now with the computerization of banking data and the advent of electronic banking, citizens are even more vulnerable to intrusions of their privacy through unauthorized divulgence of financial data to the government and private firms. Furthermore, in an effort to interdict money laundering, American banks are *required* to report voluminous data to the U.S. government on large cash transactions.

After contrasting the American and Swiss approaches to bank privacy, Professor Malloy focuses on the tension between those two approaches. This tension is explored through a series of U.S. decisions resolving claims by foreign bank defendants, within the jurisdiction of American courts, that they were shielded from disclosing customer data because such disclosures would violate the criminal law in their home countries. In the interest of comity, American courts have deferred to bank secrecy laws in Switzerland and elsewhere where the information

5. Harris v. Balk, 198 U.S. 215 (1905).
6. Pub. L. No. 95-630, Title XI, 92 Stat. 3697 (1978) (codified at 12 U.S.C. §§ 3401-3422 (1998)).

sought was duplicative or nonessential.[7] Where the requested information was crucial to law enforcement or where U.S. nationals availed themselves of bank secrecy laws abroad to evade domestic laws, however, American courts have mercilessly overruled bank secrecy claims.[8]

Economic sanctions, for which the banking system serves as a transmission belt, are the last topic of the book. Foreign governments commonly have substantial sums on deposit with U.S. banks, for clearing purposes or otherwise. When rival political factions vie to represent a foreign state, or when the United States imposes economic sanctions on an enemy, disputes over control of funds are inevitable and banks face exposure for making unauthorized payments. Professor Malloy approaches these problems through an in-depth examination of the three federal statutes on economic sanctions, followed by a simulation exercise for students. He concludes with consideration of the choice-of-law principles involved when disputed dollar-denominated accounts are located at foreign branches of U.S. banks.

The simulation on economic sanctions is only one of multiple client counseling and planning problems that are thoughtfully incorporated into the book. These problems give students repeated opportunities to probe the ambiguities, inconsistencies, and wisdom of principles in international banking law when applied to new scenarios. Students will be intrigued to learn how the top foreign policy news stories—whether those stories have to do with international drug cartels, warfare and economic sanctions, or revolutions and nationalization—are intertwined with international finance. The amount of material is very well-paced for a three-hour course.

A few minor quibbles can be expected with the first edition of any casebook, and this one is no exception. It would be helpful earlier on to define terms, such as "representative office" and "Edge Act Corporations," that eventually are explained in Chapter Four. Some readers may want a more extensive discussion of the problems requiring greater cross-border banking supervision in Chapter One. In isolated spots, federal regulations that are printed wholesale in the casebook either need editing or further guidance to students in the note material. Similarly, one or two cases suffer from awkward editing, apparently in order to defer presentation of crucial holdings to a later portion of the book.

These flaws do not detract in any major way, however, from what is unquestionably a major new addition to the banking law curriculum. As the only American casebook exclusively on international banking, Professor Malloy's new

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7. *See* United States v. First Nat'l Bank, 699 F.2d 341 (7th Cir. 1983); *see also* Trade Dev. Bank v. Continental Ins. Co., 469 F.2d 35 (2d Cir. 1972).

8. *See In re* Grand Jury Proceedings, 532 F.2d 404 (5th Cir. 1976), *cert. denied sub nom.* Field v. United States, 429 U.S. 940 (1976); *see also* Securities Exchange Comm'n v. Banca Della Svizzera Italiana, 92 F.R.D. 111 (S.D.N.Y. 1981).

casebook fills a badly needed gap.[9] It will be invaluable for courses that are already being taught and will undoubtedly inspire new courses in international banking law at law schools.

9. *See generally* HAL S. SCOTT AND PHILIP A. WELLONS, INTERNATIONAL FINANCE: TRANSACTIONS, POLICY, AND REGULATION (Foundation Press, 5th ed. 1998) (covering some of the same material, but within the larger context of international finance generally, including the capital markets).

Citizens, Strangers, and In-Betweens: Essays on Immigration and Citizenship

BY PETER H. SCHUCK, Boulder and Oxford: Westview Press, 1998.

Reviewed by Polly A. Webber*

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I. INTRODUCTION

Until recently, immigration law and policy have been largely ignored as esoteric and dry administrative topics best left to academics and government analysts. Over the past twenty years, however, an appreciation for the complexity and highly volatile nature of the immigration debate has developed among legal scholars, judges, lawyers, lobbyists, legislators, educators, religious and community leaders as well as the general public. According to Peter H. Schuck, a professor of law at Yale Law School, this development over the past twenty years is no coincidence. He attributes the increased interest and analysis of immigration law and policy to the evolution of a "communitarian" concept of immigration issues, which recognizes a duty owed to all individuals who manage to reach America's shores. He explains the evolution of this approach, as it has evolved through the various economic, political and social nuances of our society, and its implications for the future in his book, *Citizens, Strangers and In-Betweens: Essays on Immigration and Citizenship.*

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* Judge Webber is an Immigration Judge with the Executive Office for Immigration Review, U.S. Department of Justice, sitting in San Francisco, California. She is a graduate of the University of California, Berkeley [A.B. Abstract Mathematics], and Hastings College of the Law [J.D.]. Judge Webber is a past national president of the American Immigration Lawyers Association [1989-90] and taught immigration and nationality law at the University of Santa Clara School of Law from 1980-84. She practiced immigration law in San Francisco, Oakland and San Jose, California for eighteen years before joining the bench, and was a certified specialist in this field. She has lectured and written extensively.

Professor Schuck is the Simeon E. Baldwin Professor at Yale Law School. His publication is another in a series of books analyzing currents in immigration law and policy in the United States.[1] While Schuck performs this intensely complicated and comprehensive undertaking with considerable skill and exhaustive research and thought, it is not a work that is easily digested by even the most interested and motivated non-academic immigration law specialist. Indeed, Schuck's many forays into sociological and economic analysis often lose even the determined reader and inhibit one's ability to grasp the points he is trying to make. Portions of his book were written fifteen years ago, just before the greatest volume and quantity of changes to our immigration laws occurred. The reader is thus forced to remember that assertions made in 1984 may have been applicable then but may also have been superseded by more current events.

A. Contextual Framework

The book is comprised of fourteen essays that Shuck has written over the past fifteen years, half within the past three years.[2] It is organized into five parts, with Part 1 describing the evolution of the current system, defining its major players, the demographic context of the current immigration policy debate, and the manner in which the currents in that very public debate have developed.

Schuck has elsewhere described American immigration law as "distinctive, even exotic," when compared with that of other countries.[3] He describes the borders as essentially "open" for the first century, with migration patterns shaped largely by economic, political, ethnic and religious developments rather than by laws.[4] Schuck surveys the development of federal restrictions chronologically, beginning in the late 1800s with the infamous Chinese Exclusion Act, followed later in the early 1900s by literacy requirements aimed at restricting southern and eastern European immigration. In 1924 came the National Origins Act, which devised a system of quotas favoring immigrants from traditional source countries,[5] while placing a numerical limit on immigration and prohibiting Japanese immigration altogether. The national origins system was replaced finally in 1965, with a system that treated all non-Western Hemisphere countries equally as source countries for

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1. In addition to the fourteen essays in this book, Schuck has written CITIZENSHIP WITHOUT CONSENT: ILLEGAL ALIENS IN THE AMERICAN POLITY, with ROGERS M. SMITH (1985); PATHS TO INCLUSION: THE INTEGRATION OF MIGRANTS IN THE UNITED STATES AND GERMANY, with RAINER MUNZ (1997); and a host of journal articles and book reviews.

2. *See* PETER H. SCHUCK, CITIZENS, STRANGERS AND IN-BETWEENS: ESSAYS ON IMMIGRATION AND CITIZENSHIP xvii-xviii (1998).

3. Peter H. Schuck, *Stephen H. Legomsky's Immigration and the Judiciary: Law and Politics in Britain and America*, 83 AM. J. INT'L L. 217 (1989) (book review).

4. *But see generally* GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW (1996) (describing regulation of migration in the period 1789 to 1924 through state and local governments involving criminal, vagrancy, quarantine and registration laws).

5. Primarily the British Isles, Germany and Scandinavia.

immigration, and emphasized family unification over employment and refugee interests. In 1977, Eastern and Western Hemisphere quotas were merged into a worldwide system based on a complex numerical limitation formula, ostensibly to insure equality of visa availability among nations.[6]

The 1980s brought the Refugee Act of 1980,[7] the Immigration Marriage Fraud Amendments of 1986,[8] and the Immigration Reform and Control Act of 1986.[9] The Refugee Act of 1980 established a uniform structure for admitting refugees and adjudicating asylum claims. IMFA enacted rules to discourage people from entering sham marriages as a means of migration. IRCA provided several amnesty programs for farmworkers, long-term residents, and Cubans and Haitians, an employer sanctions program to prohibit employers from hiring undocumented workers, and an anti-discrimination program to protect legal workers who might otherwise be denied employment because of the sanctions program.

The 1990s were also prolific in immigration legislation, beginning with the Immigration Act of 1990,[10] which re-wrote nearly all provisions relating to legal immigration and naturalization. The Antiterrorism and Effective Death Penalty Act of 1996,[11] provided for secret proceedings for suspected terrorists and removed traditional relief from deportation for certain criminal aliens.[12] In 1996, the Illegal Immigration Reform and Immigrant Responsibility Act[13] overhauled the enforcement provisions of the Immigration and Nationality Act,[14] radically limiting traditional procedural and substantive rights of aliens. Previous powers of federal

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6. While appearing on its face to be more equitable to countries around the world, this change in the law had a devastating effect on people waiting to immigrate from Mexico. Under the former Western Hemisphere quota, Mexico was allocated about 80,000 visas per year, based on demand. When the law changed in 1977, Mexico ended up with a limit of 20,000 visas, or only 25 percent of its previous level of legal immigration.

7. Refugee Act of 1980, Pub. L. 96-212, 94 Stat. 102 (codified at 8 USC §§ 1101, 1151-1153, 1157-1159, 1181, 1182, 1253-1255, 1521-1525 and 22 USC § 2601).

8. Immigration Marriage Fraud Amendments of 1986, Pub. L. 99-639, 100 Stat. 3537 (codified at 8 USC § 1186a) [hereinafter IMFA].

9. Immigration Reform and Control Act of 1986, Pub. L. 99-603, 100 Stat. 3359 (codified at 8 USC §§1160, 1187, 1188, 1255a, 1324a, 1324b, 1364, 1365) [hereinafter IRCA].

10. Immigration Act of 1990, Pub. L. 101-649, 104 Stat. 4978 (codified at 8 USC §§1186b, 1288, 1254a, 1304, 1324c, 1252b and 29 USC § 1506).

11. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, 110 Stat. 1214 (codified at 8 USC §§ 1189, 1252c, 1531-1537; 18 USC §§ 2332b-2332d, 2339B, 3059B, 3295, 3613A, 3663A; 22 USC §§ 262p-4q, 2349aa-10, 2377, 2378, 2781; 28 USC §§ 2261-2266; 40 USC §§ 137; and 42 USC §§ 10603b, 10608) [hereinafter AEDPA].

12. *See* AEDPA.

13. Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. 104-208, 110 Stat. 3009-3546 (codified at 8 USC §§ 1225a, 1229, 1229a-1229c, 1231, 1324d, 1363b, 1366-1375, 1623, 1624 and 18 USC §§ 116, 611, 758) [hereinafter IIRIRA].

14. Immigration and Nationality Act, Pub. L. 105-220, 66 Stat. 163 (codified at 8 USC §§ 1101-1105, 1151-1160, 1181-1183, 1183a, 1185, 1186a, 1186b, 1187-1189, 1201-1204, 1221, 1222, 1224, 1225, 1225a, 1226-1229, 1229a-1229c, 1230, 1231, 1251, 1252, 1252a, 1252b, 1253, 1254, 1254a, 1255, 1255a, 1256-1260, 1281-1288, 1301-1306, 1321-1324, 1324a-1324d, 1325-1330, 1351-1363, 1363a, 1363b, 1401-1409, 1421-1433, 1435-1440, 1440-1, 1441-1448, 1450-1455, 1457, 1458, 1481, 1483, 1488, 1489, 1501-1504, 1521-1524, 1531-1537 and 18 USC § 1429) [hereinafter INA].

courts and immigration judges to review enforcement decisions were taken away or curtailed, and the enforcement branch was endowed with powers to summarily exclude people at the border, and to detain certain criminal aliens without recourse.

In 1997, under considerable pressure, Congress enacted legislation to provide a kind of amnesty for Central Americans who had been recognized as potential asylum recipients many years ago but whose cases had been held up by litigation.[15] Close on its heels was legislation to extend similar assistance to Haitians.[16] Ameliorative legislation is also being considered for other groups seeking protection due to unique circumstances in their home countries.

Schuck describes the various players in the immigration debate as the "restrictionists," which include those espousing philosophies of xenophobia,[17] nativism,[18] principled restrictionism[19] and pragmatic restrictionism,[20] and the "expansionists," who espouse either a principled expansionist (open border) philosophy[21] or a pragmatic expansionist philosophy.[22] Schuck notes that because the interests of these various groups often overlap, it is sometimes difficult to distinguish one from the other. Schuck considers himself a "moderate expansionist."

American attitudes, according to Schuck, generally reflect a preference for immigrants themselves over the concept of immigration, legal immigration over illegal immigration, past immigration over recent immigration, and refugees over other immigrants. Americans tend to support access by immigrants to education but not to welfare, and to recognize positive contributions that immigrant diversity brings, short of the thorny language issues.

Despite these diverse currents in American thought, levels of legal immigration remain high, and Schuck relates that due to youth and fertility rates among

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15. Nicaraguan Adjustment and Central American Relief Act of 1997, Pub. L. 105-100, 111 Stat. 2193 (this public law is not codified as of yet) [hereinafter NACARA].

16. Haitian Refugee Immigration Fairness Act of 1998, 8 U.S.C. §§ 1255, 1377-1378 (1998) [hereinafter HRIFA].

17. *See* SCHUCK, *supra* note 2, at 5 (defining xenophobia as "an undifferentiated fear of foreigners or strangers as such").

18. *See id.* at 5 (defining nativism as a more discriminating and specific position than xenophobia, having "a belief in the moral or racial superiority of the indigenous stock"). Schuck states that American nativism recognizes the superior stock as the "Anglo-Saxons who became demographically, politically, and culturally dominant." *Id.*

19. *See id.* at 7 (defining principled restrictionism as "the view that current levels of immigration threaten particular policy goals or values advocated by the restrictionist").

20. *See id.* at 8 (defining pragmatic restrictionism as supporting the same policy positions as principled restrictionism, but without the belief that current levels of immigration pose an inherent threat to their goals or values). The pragmatic restrictionist views the conflicts as contingent). *Id.*

21. *See id.* at 4 (citing libertarians, some economists and the editorial page of the *Wall Street Journal* as examples of principled expansionists).

22. *See id.* at 5 (identifying agricultural and other business interests as pragmatic expansionists because of their desire to obtain cheap or otherwise needed labor). Schuck also includes human rights advocates and ethnic groups in this category of expansionists. *Id.*

immigrants, they account for more than a third of population growth in the United States. Schuck submits that the demographics of the United States are changing rapidly, and that most Americans are now "pragmatic restrictionists."

B. The Courts and Immigration

Part 2 describes the role that the courts have played in the development of modern immigration law in the United States, particularly within the past twenty years. In an essay written in 1984, Schuck discusses the transformation of immigration law from an individualist, classical mode of not disturbing agency discretion, to what he coins as a "communitarian" mode which recognizes a duty owed to all individuals who manage to reach America's shores and thus accords more rights to aliens seeking redress in our courts. Schuck explains that the INS itself was in a state of disarray in the 1980s, overwhelmed by the surges in applications and the complex issues being presented. Thus, it was time for the courts to become more involved in these issues.

Indeed, in the 1980s, the administrative law caseloads of federal courts revealed a major increase in immigration matters, both in substantive challenges to deportation and exclusion, and in policy matters as well. Asylum claims became a major focus of adjudications both by the INS and by the courts. Courts departed from their traditional approach of deferring to agency discretion and began to give the claims serious consideration.

Added to this environment is the fact that in 1983 the immigration court was removed from the INS and relocated in the independent, newly created Executive Office for Immigration Review. The move aided immigration judges in making more independent decisions without the appearance of agency interference.

In the complete essay written in 1992, Schuck and his co-author, Theodore Hsien Wang, researched court decisions of the 1980s testing a hypothesis that the courts had developed an "alien protection jurisprudence."[23] Their hypothesis was largely unsupported by their data, except with regard to certain subsets of cases. Schuck does not include the analysis of the caselaw, but he summarizes its findings as follows:[24]

1. The 1980s witnessed a significant growth in immigration litigation in the district courts and especially in the circuit courts. The Ninth Circuit consistently heard approximately half of the circuit court immigration litigation throughout the decade. The Ninth Circuit's share of the district court caseload was much smaller.

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23. Peter H. Schuck and Theodore Hsien Wang, *Continuity and Change: Patterns of Immigration Litigation in the Courts, 1979-1990*, 45 STAN. L. REV. 115, 118 (1992).

24. *See* SCHUCK, *supra* note 2, at 84-86.

2. Aliens from regions neighboring the United States tended to have higher overall success rates in the courts than those from more distant regions.
3. The number of appeals from deportation orders rose dramatically during the decade. Exclusion cases, in contrast, grew more slowly. They composed a very small share of the circuit court caseload, especially in the Ninth Circuit, where deportation cases are concentrated, and an even smaller share in the district courts.
4. Affirmative challenges, common in even 1979, composed a declining share of the overall caseload despite an increase in absolute numbers. However, the impact litigation component of the affirmative challenge category - challenges to statutes, regulations, and practices of general applicability - grew substantially as a percentage of the caseload. Aliens enjoyed an impressive success rate in such cases, particularly in the courts of the Ninth Circuit, where they won the majority of their impact lawsuits.
5. Asylum litigation grew only slowly before 1985 but increased rapidly thereafter. Salvadorans enjoyed a high success rate, while asylum claimants from the Middle East, a region traditionally favored by U.S. refugee law, fared much worse.
6. In general, the data contradicts, but does not conclusively refute, the alien protection jurisprudence hypothesis, which posits the emergence of a pro-immigrant legal climate. The overall success rate for aliens in courts declined from 36 percent in 1979 to 27 percent in the 1989-90 period.
7. Asylum claimants fared better by the end of the decade, winning 37 percent of their cases in the 1989-90 period. In 1989-90, the Ninth Circuit produced more pro-alien asylum decisions compared with other circuits, and compared with its own decisions in 1979. Aliens also fared better in impact litigation as the decade progressed, especially in the Ninth Circuit.
8. Throughout the decade, reviewing courts proved increasingly likely to affirm INS and BIA decisions in statutory review cases. The affirmative rate reached 70 percent by 1989-90. But despite this increase, another study of Schuck's showed that the affirmance rate actually declined after the Supreme Court's *Chevron*[25] decision and the Ninth Circuit's relatively pro-alien decisions may have been responsible for most of that reduction.

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25. *See* Chevron USA v. National Resource Defense Council, 467 U.S. 837 (1984) (holding that where Congress either explicitly or implicitly leaves a gap in a statute to be filled by an agency, the courts should defer to the agency unless to do so would be either irrational or clearly error).

9. Although Schuck's data concerning what occurred after remand are sketchy, it appears that the INS and BIA lack vigor in pursuing the cases that the courts remand to them. Schuck posits that their passivity may be due to the belief that most of the cases will be resolved collaterally.

C. The Politics of Immigration

Part 3 describes the forces of public opinion as expressed through intense and increased lobbying and their effect on the development of immigration legislation, concentrating on the developments of the 1990s. In discussing the politics of immigration, Schuck points out the need to differentiate among the various policies at work. He distinguishes between policies relating to *legal* immigration, *illegal* immigration, and finally immigrants once they are established in the United States. Schuck devotes a chapter to the development of law and policy in the 1980s, arising out of the objective conditions going on around us, including the Mariel boatlift from Cuba, revolutions and upheaval in Haiti, Central America, Iran, and Eastern Europe. The domestic climate was in flux because the Carter Administration was replaced by the Reagan Administration, the country was in the midst of high unemployment and inflation, and because of the hostage crisis in Iran.

Congress engaged in a five year long debate on issues relating to *illegal* immigration, culminating in the passage of IRCA.[26] IRCA provided a framework for sanctioning employers who knowingly hire undocumented workers by requiring employers to inspect documents relating to identity and ability to work as part of the hiring process. It also provided a large-scale amnesty program based upon either long-term unauthorized residence in the United States or agricultural employment. IRCA instituted a diversity lottery program to offer residency to 10,000 people per year from countries with low recent immigrant pools.[27]

That year, Congress also passed the Immigration Marriage Fraud Amendments of 1986, aimed at eliminating the use of sham marriages to obtain residency.

The employers who wanted more updated rules for the *legal* immigration of skilled and professional workers were among the many and diverse influences in the immigration debate of the 1980s. Members of Congress assured them that if they went along with the sanction provisions of IRCA, Congress would next undertake to reform legal immigration. However, moving in such a direction would cause an inevitable clash with organized labor, which opposed such reforms, and community organizations, who favored more emphasis on family, refugee, and

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26. *See* IRCA, *supra* note 9.

27. The diversity lottery program was viewed by many critics of IRCA as a way to appease those conservative elements of Congress who wanted to see more "white" immigration, especially from Western Europe.

other humanitarian provisions. Congress resolved to wait until it could assess the effect of IRCA before addressing *legal* immigration concerns.

Indeed, the Immigration Act of 1990 expanded *legal* immigration through the redrawing of the permanent immigration categories, the provision of family unity for families of amnesty recipients, and protected status for certain nationality groups. This Act also redrew the categories of exclusion to eliminate out-of-date ideological bases.

Schuck explains the seemingly improbable switch by Congress from restrictionist in 1986 to expansionist in 1990 as a product of two phenomena. First, there was an increase in the strength of interest groups. Second, there was an emergence of concepts or ideas that have changed people's minds in favor of expansionism. He lists and describes the many forces contributing to the immigration debate including agricultural interests, labor and business, ethnic and human rights groups, and organized restrictionists such as members of the Federation for American Immigration Reform (FAIR). The influence on the debate from various members of Congress is also factored into Schuck's discussion.

Schuck claims that the past 75 years have been controlled by restrictionists, despite the historical dominance of business interests, classically favoring expansion, in the political theater. In IRCA, agricultural interests won over restrictionists, and organized labor's influence declined, as did its membership during the 1980s. While labor favored sanctions for hiring unauthorized foreign workers, it had only lukewarm support for amnesty. Business wanted to reform and expand the anachronistic system of employment-related visas but had to wait until the "back door" of illegal immigration was closed by IRCA before Congress would address their interests.

Among the various ethnic groups, the Irish fared well in 1990 as the predominant nationality to benefit from the diversity lottery program. Hispanic groups were successful in preserving family preferences and gaining additional visas for vastly oversubscribed spouse and child categories of legal immigration. Older immigrant communities, such as Jews and Italians, were instrumental in supporting these increases which benefitted mainly Hispanic and Asian immigration. Such cooperation signaled a move toward coalition building among pro-immigration forces.

Former Congressman Bruce Morrison is given abundant credit by Schuck for coalition building among ethnic and human rights organizations to support his proposals for the Immigration Act of 1990. The ACLU, Amnesty International, religious, and other organizations expressed concern for people seeking refuge from dangers they would face at home, as well as the overly restrictive results of the marriage fraud amendments from 1986. Many of their concerns were addressed in this legislation, through provisions for temporary protected status, recognition of coercive family planning policies as grounds for asylum, and an amelioration of restrictive results from the MFA.

Schuck captures the intensity and diversity of interests at work in crafting the Immigration Act of 1990 from its initial proposal stages through conference committee to its final form. Each of the major provisions is described in relation to the various forces at work and the reasons for compromise or defeat of various viewpoints. He describes the outcome as "a pastiche of many influential groups' policy agendas."[28]

Schuck discusses the development of ideas and their effect on the immigration debate through coalition building, belief changing,[29] symbol mobilizing,[30] regime reinforcing,[31] and dissonance reducing.[32] Schuck describes the influences in terms of: 1) the emergence in the 1980s of a willingness by courts to apply constitutional and administrative law norms long established elsewhere to invalidate key INS policies and practices; 2) the emergence of studies by well-respected institutions confirming looming shortages of high-skilled workers, particularly in the computer and electronics industries, which resulted in using immigration policy to fine-tune domestic labor markets; and, 3) the emergence of specific policy designs for the future, including higher overall immigration levels, more skills-oriented admissions criteria, the primacy of family-based admissions, enhanced enforcement against documented immigrants, the elimination of certain exclusion grounds raising constitutional questions,[33] and the desire for a universalistic approach to admissions.

Schuck questions whether the ideals as articulated in the 1990 Act will endure, or whether they simply "reflect a unique resolution of conflicting forces, a temporary truce owing more to the political dynamics of a particular logroll at a particular point in time than to any broad political consensus in favor of an expansionist future."[34]

In 1996, Congress passed a law that dealt largely with policy toward people who were already legal immigrants. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996[35] adversely affected the ability of legal immigrants to qualify for certain kinds of public assistance, greatly curtailed the ability of certain immigrants with criminal convictions to retain their resident status, and provided for mandatory detention of the majority of criminal aliens whether lawful residents or not.

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28. *See* SCHUCK, *supra* note 2, at 128.

29. *See id.* at 129 (being convinced that the country faced a profound labor shortage).

30. *See id.* at 129-30 (viewing various ethnic symbols as enhancing national pride and strength through diversity).

31. *See id.* at 130 (reaffirming and supporting the status quo, like fair employment and equal protection principles emerging in the anti-discrimination provisions).

32. *See id.* at 130-31 (bringing harmony between social values and policy, such as reforming employment-based immigration to meet perceived labor shortfalls or providing a legal program to allow family members of amnesty recipients to remain in the USA until visas become available because of social interests in family unity).

33. The most notorious provisions were ideologically based, such as, excluding members of a Communist party or persons who have supported communism. These grounds of exclusion were eliminated in the 1990 Act.

34. *Id.* at 137.

35. *See* IIRIRA, *supra* note 13.

In reviewing the changes wrought by the 1990s, and particularly the 1996 Act, Schuck admits to the illogic and unjust congressional mandates that result, for example, in deportation or removal of upstanding residents with long-forgotten crimes in their youth, despite their being the sole support of their U.S. citizen immediate family members. While immigration advocates charge that these changes reflect a victory of restrictionists over reason, Schuck believes that the opposite is true. He asserts that our immigration policy is more generous, color-blind and politically durable.[36] He bases this conclusion on the fact that although the 1996 Act made it easier to remove illegal aliens quickly and without court review, and ended availability of public benefits for many legal immigrants, the law also permitted admission of "the largest, most ethnically diverse group of new immigrants since 1914."[37] The Act was followed by NACARA,[38] which provided legalization for Central Americans, and HRIFA,[39] which provided legalization for Haitians.

According to Schuck, the expansionism of the 1990 Act thrives and remains the centerpiece of our legal immigration policy. Schuck describes the unusual character of this success, especially in the face of increased undocumented immigration despite IRCA. Schuck describes the attacks which were lodged against the 1990 Act unsuccessfully in the 1990s by Pat Buchanan, California's then-Governor Pete Wilson, and Congressman Lamar Smith. Schuck attributes their failures to the ambivalence of the Republican Party on immigration issues, and its inability to define a defensible party line on the subject.

Schuck defends the welfare reforms of 1996 as reasonable and justified. He points out that U.S. citizens' benefits were also cut, and that before this reform, many new immigrants actually received higher levels of benefits than their American counterparts.

However, Schuck does not defend IIRIRA, but he characterizes it as harsh and unjust, predicting that it will have "perverse effects" and will need to be changed. According to Schuck, while Congress was motivated by endless procedural delays endemic to immigration law and procedure, it has made the mistake of withdrawing necessary judicially protected due process in an effort to remedy the problems. Schuck predicts that the extreme and counterproductive provisions that deny discretionary relief in hardship cases will result in further censure and embarrassment to the INS.[40]

Schuck maintains that although there have been opportunities for restrictionists to overturn the high level of immigration incorporated in the 1990 Act, these

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36. *See* SCHUCK, *supra* note 2, at 139.

37. *See id.* at 140.

38. *See* NACARA, *supra* note 15.

39. *See* HRIFA, *supra* note 16.

40. Several federal circuit courts of appeal have already overturned the retroactivity presumptions relating to qualification for relief from deportation in the form of a Waiver of Excludability under section 212(c) of the Act, and Cancellation of Removal under section 240A(a) of the Act. *See* IIRIRA, *supra* note 13.

opportunities have failed. He attributes this failure to the recognition by politicians that they are more likely to attract new voters by supporting legal immigration. Schuck rejects the pro-immigrant forces' characterization of the 1996 Act as nativist or restrictionist. He states that the concerns about criminals, illegals, and people who perpetrate fraud and abuse and compete unfairly with low-income domestic workers are legitimate and need to be addressed.

Finally, Schuck analyzes California's Proposition 187, finding it neither a warning of imminent civil conflict nor just a California phenomenon unlikely to take root elsewhere. He believes the proposition to be "an expression of public frustration with a government and civil society that seems out of touch and out of control."[41] He seems to blame the passage of such measures at least in part on immigration advocates who insist on calling illegal aliens "undocumented workers," and further evade what he calls "realities and responsibilities" of their calling by working tirelessly and effectively to stymie INS enforcement.

D. Citizenship and Community

Part 4 departs from the general immigration law and policy theme to focus solely on issues relating to naturalization and citizenship. This is an area in which the author has written and lectured extensively,[42] and his strong ideology is evident throughout. The most provocative themes discussed are whether the children of undocumented foreigners should become U.S. citizens simply because of the fact of their births in the United States, or whether a more "consensual" scheme would re-establish the value of U.S. citizenship, which the author believes has eroded over time.

Historically, non-citizens have not had the right to vote, the right to serve on federal and many state juries, the right to seek certain elective or appointive offices, and to work for the federal government. Schuck states that prior to the 1960s, the federal and state governments could treat citizens and non-citizens differently without much scrutiny. In the 1960s, however, legislation and decisions of the Supreme Court narrowed the gap between citizen and non-citizen treatment in important ways, heightening the scrutiny that could be applied by regulatory agencies.[43] Schuck theorizes that through expanded principles of equality and due process, "in the pursuit of liberal values," the value of U.S. citizenship over lawful resident status has been greatly diminished. Indeed, he postulates, the incentive to naturalize has been eroded. This state of affairs, he says, results in four dangers: that individuals affected by political decisions take no part in them; that immigrants who do not naturalize assimilate to a lesser degree; that immigrants are less likely to

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41. *See* SCHUCK, *supra* note 2, at 149.

42. PETER H. SCHUCK AND ROGERS M. SMITH, CITIZENSHIP WITHOUT CONSENT: ILLEGAL ALIENS IN THE AMERICAN POLICY (1985).

43. *See* SCHUCK, *supra* note 2, at 168. Unfortunately Schuck does not name the cases he is discussing.

embrace the philosophical and sacrificial aspects of a truly democratic society; and that newcomers and traditional communities will be less likely to overcome cultural, religious, lingual and other differences with the absence of a common citizenship.

Schuck believes that society, in turn, can become vulnerable to a debased or inferior quality of life, as the newcomers are exposed to exploitation and injustice at the hands of citizens, and people give in to less honorable tendencies toward "xenophobia, petty localism, intolerance and privatistic self-absorption."[44] Schuck admits that these dangers are mostly theoretical and not imminent. In fact, he goes on to describe the cyclic nature of the devaluation-reevaluation dichotomy, including the 1996 legislation that is shifting the balance back to a more heightened valuation of citizenship.[45] Schuck postulates that the American mentality finds comfort in the safety of U.S. citizenship from an increasingly global economy, with America's diminished autonomy and increased migration across our borders. He believes that the re-evaluation of citizenship stems from five fairly recent developments: accumulation of multicultural pressures; the loss of a unifying ideology; technological change; the expansion and consolidation of the welfare state, and the devaluation of citizenship.[46]

Schuck argues that as the Republican congressional majority's agenda since 1994 is devolution of power from the federal government to the states, the meaning of citizenship is shifting. While he finds it improbable that Congress will ever devolve authority over immigration policy to the states, he discusses the increasing power states have accumulated to make decisions based upon the immigration status of its constituents. In the 1996 welfare reform law, for example, states were accorded a greater say over how their federally and other sourced welfare dollars would be spent, depending on the status of the applicants.

In his chapter on consensual citizenship, Schuck argues for eliminating the birthright concept, that anyone born in United States is a U.S. citizen.[47] In its place, he proposes what he characterizes as a "consensual" concept of citizenship, based upon consent of the individual as well as of the existing community in which the individual seeks membership. Under Schuck's system, children who are born in the United States would only become U.S. citizens if their parents are U.S. citizens or lawful permanent residents. Even then, their citizenship status would be provisional

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44. *See id.* at 173.

45. Legislation enacted in 1996 greatly reduced access of non-citizens to public benefits, enhanced the government's ability to remove previous immigration law violators and criminal aliens, and eliminated relief from removal formerly available to certain long-term resident aliens who could demonstrate rehabilitation and extreme hardship. Furthermore, it took away eligibility for bond for certain criminal aliens and those who had not entered the country lawfully.

46. *See* SCHUCK, *supra* note 2, at 190.

47. With notable exceptions, such as for the children of foreign diplomats born here.

until the age of majority, when it could be renounced.[48] The only other citizens would be those for whom Congress has consented to their citizenship.

The author's thesis has been soundly criticized as "highbrow rhetoric from moral and political theory, lending apparent legitimacy to arguments for stern measures against undocumented aliens."[49] The work is characterized as putting forth an "implicit moral argument that illegal aliens dilute the economic value of citizenship and sully its political value."[50] Schuck's reliance on the work of Locke is cast as "(standing) him on his head,"[51] and Schuck's reliance is characterized as a bid for appearing to be liberal when "there is nothing intrinsically liberal about consensual citizenship as they define it."[52]

The competing philosophical arguments are weighty and complex. What Schuck admits is that the birthright approach to citizenship is certainly easier to administer, in its clarity and simplicity, and it is not likely to be replaced by Congress in favor of Schuck's consensual proposal in the near future.

E. Current Policy Debates

In Part 5, Schuck describes the current debates involving civil rights, refugee law, the diversity of the newer immigrant population and the contributions they make to American society. In his chapter on civil rights, Schuck tackles the sensitive and highly charged issues including his belief that Black Americans are steadily losing power relative to other groups, and that the collective memory of immigrant communities tends to undermine the group claims and status of Black Americans. He discusses four socioeconomic aspects of the competition between Black Americans and other ethnic groups, including job competition, competition over public benefits, differentiation within the Black community itself, and differentiation among the various ethnic groups. He claims that these tensions are being magnified in the current environment. However, Schuck believes there are also more optimistic developments including coalition building across racial lines, and a new nonracial approach to devising programs that address the needs of racial minorities and lower income communities.

In his chapter on refugee law, Schuck starts by describing the current international environment, with its over fifteen million individuals seeking international protection and assistance, some of it temporary and some of it permanent. Schuck focuses not on the individual suffering and needs of the

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48. Schuck's theory is that a child born in the United States of a lawful resident or naturalized parents may also be considered a citizen of the country of his or her parents' births. Upon reaching the age of majority, he or she might well renounce the U.S. citizenship in favor of citizenship in one of the ancestral countries.

49. David S. Schwartz, *The Amorality of Consent*, 74 CAL. L. REV. 2143 (1986). *See also* Gerald L. Neuman, *Back to Dred Scott?* 24 San Diego L. Rev. 485 (1987).

50. Schwartz, *supra* note 49, at 2164.

51. *Id.* at 2149.

52. *Id.* at 2150.

refugees, but on the burdens which they impose, often without warning, on the receiving countries. His premise is that the receiving countries should shoulder their obligations more widely and fairly than at present, because the impact is so uneven.

Schuck describes the current system as unworkable and in need of vast improvement. It is not capable of providing adequate protection to the enormous and growing number of people fleeing intolerable conditions. While Schuck recognizes the heroic contributions of many forces, he states simply that they are not enough.

Schuck recognizes four strategies for improving refugee protection: 1) eliminating the root causes of refugee flows; 2) prompt repatriation of refugees (once conditions have stabilized to insure safe return); 3) temporary protection of refugees; and, 4) permanent resettlement of refugees in third countries. He recognizes that each strategy is problematic.

His "modest proposal" involves organizing a group of countries which would agree to observe a strong norm of proportional burden-sharing for refugees, would seek to induce other countries to join, and would arrange for an existing or newly established international agency to assign to each participating country a refugee protection quota. Any country could then trade its quota by paying other countries to fulfill its obligations. Schuck prefers a model built on a regional structure, where refugees would resettle in receiving countries in their own region.

Two of the chapters in this part review and critique recent publications which he describes as "highly controversial." Schuck's chapter on "Perpetual Motion" critiques *Migrations and Cultures: A World View*,[53] by Thomas Sowell, senior fellow at Stanford's Hoover Institution, which looks at the worldwide migration patterns and achievements of six very diverse ethnic groups. In each case, the groups have been economically successful in their destination countries, albeit only after overcoming initial major disadvantages. Sowell chose ethnic groups from widely differing races, languages, religions, countries of origin, destination countries, and even time frame in which the relocation took place. After a lengthy analysis of Sowell's various findings, Schuck endorses Sowell's conclusion that immigrants do better when they assimilate into the dominant culture, putting forth an "individualistic, apolitical, market-oriented strategy of human and social capital accumulation" rather than "the politics of ethnic protest advocated by many minority group leaders."[54]

Another chapter, "Alien Rumination: What Immigrants Have Wrought in America," takes Peter Brimelow to task, for the extremist themes he professes in his book, *Alien Nation: Common Sense About America's Immigration Disaster*,[55] including the proposal that legal immigration to the United States be cut off

53. *See* THOMAS SOWELL, MIGRATIONS AND CULTURES: A WORLD VIEW (1997).

54. *See* SCHUCK, *supra* note 2, at 280. The reader may be interested in the work of Claude Steele, professor of psychology, Stanford University.

55. PETER BRIMELOW, ALIEN NATION: COMMON SENSE ABOUT AMERICA'S IMMIGRATION DISASTER (1995).

entirely. Schuck warns that although some analysts write Brimelow off as an extremist whose ideas are only palatable to that fringe, his book is already influencing the public immigration debate. Indeed, Brimelow has enjoyed prime time prominence on talk shows and debates and has testified before Congress about his proposals to drastically cut immigration. Brimelow criticizes the 1965 Act, which resulted in a more diverse immigrant culture, as having diluted the pre-1965 "predominantly white 'Anglo-Saxon' Protestant stock that made America great," but essentially ignores the historical presence of African and Mexican "stock" in the national community, and the large number of Asian immigrants in the aftermath of the Civil War. Schuck concludes this chapter and the book with a summary of his own outlook, that the period 1965 to the present reflects an unparalleled increase in the collective quality of life in this country, that the large and diverse immigrant community joining our culture during this period has contributed to our prosperity and to a more just legal system, and that their values, optimism and energy are essential to the progress and vigor of our nation. He warns, however, that immigration policy must continue to adapt to a changing society, and that the United States should seek out those immigrants who are most likely to succeed in the new millennium. His thesis is of continuing rather than curtailing the flow of immigration, so long as the quality of immigrants is not compromised.

II. CONCLUSION

Schuck's theme throughout his book is that immigration law and policy need to change if our society is to thrive. He calls for stronger measures to deter and eliminate undocumented or illegal immigration, more consistency and integrity in agency decision-making, and a reorientation as to what kinds of people should become a permanent part of our society. He calls for:

1. a recognition by "liberalists" and the "policy elite" that a more responsible approach needs to be taken with respect to advocating rights of undocumented, visa violators, and criminals. Indeed, Schuck blames these sectors of the debate for over-reaction by Congress, the courts and the administration because of what he describes as their irresponsible loophole shopping to prevent enforcement of borders and removal from the United States;
2. the INS to be more consistent, accurate, fair and dignified in its decisions, as mandated by courts if necessary;
3. beefed up enforcement of the border with greater resources;
4. continue to restrict access to courts to curtail or eliminate the unending series of appeals, motions to reopen and other procedures Schuck regards as delay tactics by unworthy individuals; and

5. make the USA less appealing to border and visa violators by withdrawing the availability of U.S. citizenship to their children born here, and by denying public benefits such as education and health care.

Schuck recognizes that some of these proposals are contradictory with recent reforms. For example, the courts cannot mandate a more dignified and uniform adjudicatory process within the INS if people have no right to seek redress in the federal courts.

There are a host of proposals for the reorganization of the INS which are being debated at this time. Unfortunately, Schuck does not discuss this development or his views of the various proposals. The most widely discussed proposal is the separation of the adjudication function from the enforcement or investigatory function. It is widely agreed that the INS is crippled at the present time and forced to operate in a "fire brigade" or crisis mode. It is hoped that through a major overhaul of its organizational structure, a more efficient and modern agency or agencies will develop.

It is clear that Schuck wants recognition and acceptance for his perspectives as a "moderate liberal." While he champions the cause for moderate expansion of legal immigration, his preference is for immigration of the more skilled and easy to assimilate individuals. He also criticizes any policies that he believes could even remotely encourage illegal or undocumented immigration, and he sees the recent legislative acts to deny benefits to criminal and illegal aliens as predictable and appropriate in many ways.

Schuck is highly critical of immigration advocates who he believes go too far in advancing their interests. He warns that their approach actually triggers overly restrictive and reactive policies from executive and legislative forces, resulting in the opposite of what they have advocated. Schuck further denigrates this energetic group by charging that their analysis of the issues lacks academic rigor. This provocative dismissal of a large and vocal, committed and highly educated group of advocates is disturbing, particularly because the criticism pretends to be analytical and free from bias.

It is disturbing, for example, that Schuck makes so little mention of the contributions of legal organizations such as the American Immigration Lawyers Association, which shifted its participation in the immigration debate from reactive to proactive in the early 1980's. This organization was instrumental in bringing home to legislators, lobbyists, and the judiciary the consequences of ill-drawn provisions of law and improper, often unlawful enforcement practices experienced by their largely immigrant clientele.[56] Schuck is quick to dismiss the legitimate

56. Several other organizations are also worthy of recognition for their contributions in this evolution of litigation in the immigration field, among them the American Civil Liberties Union (ACLU), the Council of La Raza, the Mexican American Legal Defense and Education Fund (MALDEF), and the NLG National Immigration Project.

experience of the legal advocates as not empirical or rigorous, and he misses the point completely of their legitimate contributions.

As Schuck has discussed the tremendous changes in the treatment of immigration cases by the courts beginning in the 1980s, he lost sight of who it was that litigated those cases, if not the immigration advocates. Schuck has criticized the advocates for delaying the process of the inevitable deportation of their clients by abusing the regulatory and appellate systems, yet in the same breath he has pointed to the widespread abuses by the INS for explaining the need for the courts to intervene.

Obviously the INS has not been inefficient or abusive in its handling of immigration cases over the decade simply because of the tactics of zealous advocates in keeping their clients here to pursue forms of relief which the law has accorded to them. No one has experienced the delay tactics of advocates more, perhaps, than immigration judges who are after all the first line in the hierarchy of redress by aliens. While such delay tactics are frustrating and certainly not appreciated by the courts, the problem lies not with the advocate who takes advantage of the system, but with the inadequacies of the system itself. Great strides have been taken by Congress recently to prevent delay tactics from working to the advantage of aliens in this day and age.[57]

While much of Schuck's book appears to present a fair and impartial analysis of the complex social forces at work as a result of our history and the recent unprecedented levels of immigration to the United States, his inadequate treatment of immigration advocacy raises questions about how reliable his predictions might be.

57. IIRIRA provided that the accumulation of physical presence time [for purposes of cancellation of removal in removal proceedings and suspension of deportation in deportation proceedings] was cut off by the issuance of a charging document to initiate removal proceedings. The commission of a crime with immigration consequences further cuts off the accumulation of physical presence and residency [for purposes of cancellation of removal in removal proceedings and 212(c) relief in deportation proceedings].